U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 15-0045 BLA
and 15-0046 BLA

CHARLES ALLENE GULLEY, o/b/o and as survivor of, ELLIS GULLEY	)	
Claimant-Respondent	)	
v.	)	
PREMIER ELKHORN COAL COMPANY	)	DATE ISSUED: 11/23/2015
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Lois A. Kitts (Baird and Baird, P.S.C.), Pikesville, Kentucky, for employer.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (2009-BLA-5844 and 2012-BLA-5772) of Administrative Law Judge Daniel F. Solomon with respect to a miner's claim filed on October 16, 2008 and a survivor's claim filed on December 13, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30

U.S.C. §§901-944 (2012)(the Act).[1] The administrative law judge found that the miner had "at least [thirty] years of coal mine employment, and at least [four] months [were] in underground mining," based on the parties' stipulation. Decision and Order at 2. Further, he found that, in addition to the four months in underground mining, the miner's twenty-nine years and eight months of surface mining were in conditions substantially similar to those in an underground coal mine employment. The administrative law judge also found that the miner was totally disabled prior to his death pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis as set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge further found that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4). Accordingly, the administrative law judge awarded benefits in both the miner's and the survivor's claims.[3]

On appeal, employer contests the administrative law judge's finding that the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) was invoked. Specifically, employer argues that the record fails to support the administrative law judge's finding that the miner's surface mining conditions were substantially similar to those in underground mining. Employer also contends that the administrative law judge erred in finding that the presumption was not rebutted as the evidence disproved the existence of legal pneumoconiosis and disability causation.[4] Specifically, employer

[1] Claimant is the widow of the miner, who died on November 11, 2010. Director's Exhibits 62, 67.

[2] On March 23, 2010, amendments to the Act were enacted, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, amended Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner establishes a totally disabling respiratory or pulmonary impairment and at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. *See* 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[3] Subsequent to the miner's death, the miner's claim was consolidated with the widow's claim for the entry of an award of survivor's benefits under the derivative entitlement provision as set forth in amended Section 422(l). *See* 30 U.S.C. §932(*l*). Under that provision, a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. *See Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193 (2010).

[4] Under the implementing regulations, once the presumption is invoked, the burden shifts to employer to rebut the presumption by showing that the miner did not

argues that the administrative law judge failed to sufficiently consider the treatment records, improperly evaluated the opinions of Drs. Jarboe and Rosenberg, substituted his own opinion for those of the medical experts, and failed to comply with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Employer's Brief at 22-27. The Director, Office of Workers' Compensation Programs, responds, arguing that the administrative law judge correctly determined that claimant was entitled to invocation of the presumption at amended Section 411(c)(4), and that employer failed to rebut the presumption.[5] Employer filed a reply brief, reiterating its contentions. Claimant is not participating in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

The Miner's Claim

A. Invocation of the Presumption at Amended Section 411(c)(4)

In this case, the administrative law judge found that the miner worked for four months in underground mining and for at least fourteen years and eight months in conditions substantially similar to those in underground coal mining, for a total of at least fifteen years of qualifying coal mining required to invoke the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Decision and Order at 2, 4. Specifically, the administrative law judge determined that the miner operated "an end loader and dozer and sometimes a back dumper … at the stoker plant, which is usually at

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have pneumoconiosis, or that no part of his disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i), (ii).

[5] The Director, Office of Workers' Compensation Programs (the Director), observes that employer challenges the miner's lifetime award, and does not contest claimant's entitlement to derivative survivor's benefits if the miner's lifetime award is affirmed. Hence, the Director declined to separately address the survivor's claim. *See* Director's Brief at 2 n.2.

[6] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibits 2-4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

the tipple." *Id*. The administrative law judge credited the miner's testimony that he worked in "dusty jobs," and claimant's testimony that, after work, the miner's skin, hands and face would be black, and that his clothes needed to be washed separately. *Id*. at 4. In light of the evidence and testimony, the administrative law judge concluded that "the stipulated [twenty-nine] years, eight months of surface mining, four months of underground mining, and credible testimony that all of the work was 'dusty,' yields an equivalency of at least [fifteen] years of underground mining." *Id*. Based on this finding, and the finding that the miner was totally disabled,[7] the administrative law judge found that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) in the miner's claim.

Employer argues, however, that the miner's testimony failed to establish that the miner's surface coal mining was in conditions substantially similar to those in underground coal mine employment, as the miner testified only that he had a "dusty job," not that he was exposed to "coal dust." Employer's Brief at 20. Further, employer contends that the miner's testimony fails to establish the substantial similarity between his surface coal mine employment and underground coal mine employment as the miner did not "testify about the level, duration or frequency of his dust exposure."[8] *Id*. Additionally, employer avers that claimant's testimony "that the miner's face would be black when he got home from work or that she washed his clothes separately [did] not address the level, duration or frequency of [the miner's] coal dust exposure." *Id*.

In order to invoke the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), claimant must establish that the miner had at least fifteen years of "employment in one or more underground coal mines" or "in coal mines other than an under-ground mines in conditions substantially similar to those in underground mines[.]" 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(a)(i); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). In order to prove that a surface miner's work conditions were substantially similar to those in an underground mine, claimant is required to proffer only sufficient evidence of dust exposure in the miner's work environment. *Director, OWCP v. Midland Coal Co*. [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988); *see Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001). Claimant is not required to directly compare the miner's work environment to conditions

[7] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 2, 4, 5; Director's Exhibit 54 at 13-15; *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

[8] Employer concedes that "the miner had at least [thirty] years in coal mine employment. That employment, however, with the exception of four months, was on the surface operating heavy equipment." Employer's Brief at 19.

underground, but can establish similarity by proffering "sufficient evidence of the surface mining conditions in which [the miner] worked." *Leachman*, 855 F.2d at 512. The administrative law judge must then "compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines." *Id*. Exposure to any kind of coal mine dust, in sufficient quantity, may constitute qualifying coal mine employment, *see Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, BLR (6th Cir. 2015); *Garrett v. Cowin & Co., Inc*., 16 BLR 1-77 (1990), and the definition of coal mine dust is not limited to dust that is generated during the extraction or preparation of coal, but encompasses "the various dusts around a coal mine." *Pershina v. Consolidation Coal Co*., 14 BLR 1-55, 1-57 (1990). Moreover, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has stressed that questions regarding the credibility of the evidence are within the sound discretion of the administrative law judge. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 25 BLR 2-431 (6th Cir. 2013); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

Thus, contrary to employer's contention, claimant was not required to specifically show that the miner was exposed to "coal dust" as opposed to showing that the miner worked in "dusty" conditions at the surface mine. *Leachman*, 855 F.2d at 512; *see Summers*, 272 F.3d at 479, 22 BLR at 2-275. Nor, contrary to employer's contention, was claimant required to show the specific level, duration and frequency of the miner's dust exposure to establish that the conditions of the miner's surface coal mine employment were "substantially similar" to those in underground coal mine employment. *Leachman*, 855 F.2d at 512; *see Summers*, 272 F.3d at 479. Rather, in light of the uncontradicted evidence that the miner operated heavy equipment at a stoker plant at the tipple, that the miner testified that this was a dusty job, and that claimant testified regarding the miner's dirty appearance after work, the administrative law judge properly found, within his discretion as fact-finder, that the requisite similarity between surface mining and underground coal mine employment was established in this case. *See Ogle*, 737 F.3d at 1072, 25 BLR at 2-448; *Rowe*, 710 F.2d at 255; 5 BLR at 2-103. We therefore affirm the administrative law judge's finding regarding the length of the miner's qualifying coal mine employment and his finding that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) in the miner's claim.

B. Rebuttal of the Presumption at Amended Section 411(c)(4)

Employer may rebut the presumption at amended Section 411(c)(4) by affirmatively establishing that the miner did not have either clinical or legal pneumoconiosis,[9] or by establishing that "no part of the miner's disability was caused by

[9] The regulation at 20 C.F.R. §718.201(a)(1) provides that:

pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(2)(i), (ii); *W.Va. CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015); *see Ogle*, 737 F.3d at 1071, 25 BLR at 2-446; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *see also Morrison v. Tenn. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp*., BRB No. 13-0544 BLA, BLR (Apr. 21, 2015)(Boggs, J., concurring and dissenting). In this case, the administrative law judge found that employer failed to rebut the presumption under either of the methods provided.

At the outset, we note that failure to rebut the presumed existence of clinical pneumoconiosis precludes an employer from rebutting the presumption by disproving the existence of pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i); *see Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). However, because employer's arguments on the issue of legal pneumoconiosis are relevant to the administrative law judge's weighing of the evidence on disability causation, we will address them.

In finding that employer failed to disprove the existence of legal pneumoconiosis, the administrative law judge rejected the opinions of Drs. Jarboe[10] and Rosenberg,[11] that

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> "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
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> The regulation at 20 C.F.R. §718.201(a)(2) provides that:
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> "Legal Pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment.

[10] Dr. Jarboe examined the miner and diagnosed a severe pulmonary impairment indicated by very severe airflow obstruction, marked hyperinflation of the lungs, air trapping, and a severely reduced diffusion capacity, all due to cigarette-induced pulmonary emphysema. He ruled out a diagnosis of clinical or legal pneumoconiosis. Decision and Order at 7-9; Employer's Exhibits 7-10, 13.

[11] Dr. Rosenberg reviewed the miner's records and opined that he did not have medical or legal pneumoconiosis, and was disabled from a pulmonary perspective due to his severe bullous emphysema with severe disabling airflow obstruction, due to his long

the miner did not have legal pneumoconiosis, because of their reliance on the reversibility in respiratory impairment after the miner's bronchodilation treatment and because of their failure to sufficiently consider whether coal mine employment served as an aggravating cause of the miner's respiratory impairment.[12] Employer contends, however, that the administrative law judge "focused on reversibility as if that were the sole reason for Drs. Rosenberg and Jarboe ruling out coal dust exposure," although the doctors "ruled out coal dust exposure for a host of sound reasons and not just from reversibility." Employer's Brief at 23. The administrative law judge, however, noted that neither physician stated that the miner's impairment was completely reversible after the use of a bronchodilator, and thus, stated that they could not "rule out legal pneumoconiosis on this theory." Decision and Order at 6-7, 11 n.9. The administrative law judge, therefore, rationally found that the opinions of Drs. Jarboe and Rosenberg were based on the premise that the partial reversibility in the miner's respiratory impairment after bronchodilation demonstrated that coal dust exposure played no role in the impairment and properly discounted them for this reason.[13] *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 9, 11; Director's Brief at 4.

Employer also challenges the administrative law judge's decision to discount the opinions of Drs. Jarboe and Rosenberg because they did not sufficiently consider whether coal mine employment aggravated the miner's respiratory impairment. The administrative law judge discounted the opinions of Drs. Jarboe and Rosenberg because they failed to adequately account for the effect of the miner's thirty years of coal mine employment on his respiratory impairment. Employer asserts that Dr. Jarboe's disability causation opinion relied on a "markedly reduced" FEV_1/FVC ratio, and a "pattern of

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smoking history, coupled with an asthmatic component. Decision and Order at 9-11; Employer's Exhibits 4-6, 16, 20-21.

[12] A disease "arising out of coal mine employment" includes any chronic pulmonary disease of respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 C.F.R. §718.201(b).

[13] An opinion that fails to adequately explain why partial reversibility necessarily rules out coal dust exposure as a cause of the fixed, irreversible component of a miner's disabling obstructive impairment undercuts the reliability of the opinion. *See Morrison v. Tenn. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-8-9 (6th Cir. 2011); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-495 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

obstruction" inconsistent with coal mine dust related airways disease. Similarly, employer argues that Dr. Rosenberg relied on a reduced FEV_1/FVC ratio "characteristic of the impairment caused by smoking and/or asthma and not coal dust inhalation." Employer's Brief at 23-25. However, the administrative law judge specifically reviewed this evidence, and properly found that employer's experts failed to persuasively account for, or exclude, the effects of the miner's coal mining history on his respiratory impairment. As the regulations "allow a claimant to establish disability on the basis of a qualifying FEV_1 [value] accompanied by [a qualifying] FEV_1/FVC value," and because the Department of Labor (DOL) "in consultation with the National Institute of Occupational Safety and Health (NIOSH), concluded that coal mine dust exposure may cause [chronic obstructive pulmonary disease], with associated decrements in FEV_1/FVC[]," this was rational. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); *see A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *see also Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-151 (6th Cir. 2012). Moreover, diminished weight may be accorded a medical expert's reliance on reduced FEV_1/FVC values as denoting a "*general pattern*" of obstruction, as failing to explain why a particular miner's pattern of obstruction has no relationship to his exposure to coal mine dust. *See* Decision and Order at 6-10; Employer's Brief at 8, 11, 24; *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998). Thus, contrary to employer's argument, the administrative law judge properly discounted the opinions because they failed to affirmatively establish that the miner's respiratory impairment was not related to his thirty years of coal mine employment. *See Morrison*, 644 F.3d at 480 n.5, 25 BLR at 2-9 n.5. The administrative law judge therefore rationally found that the opinions of Drs. Jarboe and Rosenberg failed to disprove the presumed fact of legal pneumoconiosis. Consequently, the administrative law judge properly found that employer failed to rebut the presumption at amended Section 411(c)(4) by disproving the existence of legal pneumoconiosis.[14] 20 C.F.R. §718.305(d)(1)(i)(A).

[14] Employer also contends that the administrative law judge erred in failing to consider the miner's treatment records in finding that rebuttal of the presumption was not established. Employer contends that the treatment records do not establish that the miner's chronic obstructive pulmonary disease (COPD) was due to coal dust exposure, rather than smoking. Contrary to employer's argument, however, claimant does not have to establish that the miner's COPD was due to coal dust exposure at rebuttal. Rather, to rebut the presumption at amended Section 411(c)(4), employer bears the burden of establishing that claimant does not have legal pneumoconiosis. Thus, the fact that the treating records fail to establish that the miner's COPD was due to coal dust exposure does not rebut the presumption. *See* 30 U.S.C. §921(c)(4); *W.Va. CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015); *see also Minich v. Keystone Coal Mining Corp.*, BRB No. 13-0544 BLA, BLR (Apr. 21, 2015)(Boggs, J., concurring and dissenting).

Regarding the second method of rebuttal, the administrative law judge permissibly found that the same reasons he provided for discrediting the rationale of Drs. Jarboe and Rosenberg on the issue of legal pneumoconiosis also undercut their opinions that pneumoconiosis played no part in causing the miner's disabling impairment.[15] Decision and Order at 12; 30 U.S.C. §921(c)(4); *see Ogle*, 737 F.3d at 1071, 25 BLR at 2-446; *Morrison*, 644 F.3d at 473, 25 BLR at 2-8; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-122 (6th Cir. 2000); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *see also Hobet Mining, LLC v. Epling*, 738 F.3d 498, BLR (4th Cir. 2015); *Toler v. E. Assoc. Coal Co.*, 43 F.2d 109, 19 BLR 2-70 (4th Cir. 1995). We have affirmed the administrative law judge's findings that Drs. Jarboe and Rosenberg did not provide credible opinions as to the cause of the miner's respiratory impairment. Thus, because employer's arguments under the second method of rebuttal relate to the cause of the miner's respiratory impairment, namely the existence of legal pneumoconiosis, they fail, likewise, to affirmatively disprove the presumed fact that the miner's disability was caused by pneumoconiosis. *See* Employer's Brief at 25-27; *Bender*, 782 F.3d at 144; *Morrison*, 644 F.3d at 480, 25 BLR at 2-8. The administrative law judge's determination that employer failed to establish rebuttal of the presumed fact of total disability due to pneumoconiosis under amended Section 411(c)(4) is supported by substantial evidence and comports with the requirements of the APA. 20 C.F.R. §718.305(d)(1)(ii). Consequently, we affirm the administrative law judge's award of benefits in the miner's claim.

The Survivor's Claim

Because we affirm the award of benefits in the miner's claim, we further affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to amended Section 422(*l*). 30 U.S.C. §932(*l*); Decision and Order at 1-2, 13.

Moreover, in reviewing the opinions of Drs. Jarboe and Rosenberg, the administrative law judge noted that they had considered the treatment records in formulating their opinions. Decision and Order at 9 and 11.

[15] We need not address employer's arguments regarding the administrative law judge's evaluation and weighing of the opinion of Dr. Burrell, which found that the miner's pneumoconiosis and COPD contributed to his disability, as the opinion is not supportive of rebuttal. *See* 30 U.S.C. §921(c)(4); *see also Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1986); Decision and Order at 5, 13.

Accordingly, the administrative law judge's Decision and Order Award of Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge